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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 61

GERTRUDE KAY, ALIAS GERTRUDE KLEIN,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S BRIEF.

WILLIAM S. CULBERTSON,
F. R. SHERI,
Counsel for Petitioner.

INDEX.

Subject Index.

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statement	2
Summary of argument	8
Argument	10
Point I. The Circuit Court of Appeals has the power under Rules IV and IX of the Criminal Appeals Rules to consider a bill of exceptions although filed pursuant to the order of the trial judge signed after the expiration of the thirty-day period	10
Point II. The Circuit Court of Appeals refused to review the bill of exceptions because of the alleged want of power and not in the exercise of its discretion	10
Point III. The appeal from the judgment of conviction is upon meritorious grounds	11
Point IV. The Home Owners Loan Corporation is not authorized by the fiscal powers of Congress because the act creating it does not make it a depositary of public moneys, nor a fiscal agent of the United States nor require it to invest any funds in United States Government bonds	13
Point V. Congress may tax and appropriate for the general welfare but it cannot create a corporate device which in effect dispenses with the taxing power and is a substitute for it	18
Point VI. If the Home Owners Loan Corporation be considered an exercise of the taxing power, it is not for the general welfare because it changes slightly certain creditor-debtor relations by reducing by 1% the interest rate of some home owners, and shifting the right to collect and to foreclose from many	

Page

mortgagees to one large corporation without affecting any vital national interest or relationship 20

Point VII. And whether or not the Home Owners Loan Corporation be an exercise of the taxing power for the general welfare, it is invalid because it invades the rights and powers reserved to the States and the people 22

Point VIII. Sections 1467 "A" and "E" violate both the 5th and 6th Amendments, deprive people of their liberties and contract rights without due process of law, punish them for not knowing a new law, vague and uncertain, about which lawyers are in doubt and the lower courts in conflict 25

Point IX. The Home Owners Loan Act in so far as it relates to the Home Owners Loan Corporation and Section 1467 "e" in particular are invalid as an unlawful delegation of power .. 35

Appendix—Statutes 38

Table of Cases Cited.

Ashton v. *Cameron County Dist.*, 298 U. S. 513 24

Berger v. *United States*, 295 U. S. 78 12

Board of Trustees v. *United States*, 289 U. S. 48 23

Carmichael v. *Southern Coal Co.*, 301 U. S. 495 22

Carter v. *Carter Coal Co.*, 298 U. S. 238 24

Cincinnati Soap Co. v. *United States*, 301 U. S. 308 22

Coplin v. *United States*, 88 F. (2d) 652 33

First National Bank v. *Union Trust Co.*, 244 U. S. 416 14

Handler v. *Hill*, 90 F. (2d) 573 ..... 26, 27

Helvering v. *Davis*, 301 U. S. —, 81 Sup. Ct. Rep. 804 20

Hopkins Savings Association v. *Cleary*, 296 U. S. 315 ..... 17, 25

Kay v. *United States*, 89 F. (2d) 19 ..... 1, 10, 26, 29

Langer v. *United States*, 76 F. (2d) 817 17

Louisville Joint Stock Land Bank v. *Radford*, 295 U. S. 555 23

	Page
McCulloch v. *Maryland*, 4 Wheat. 316	13
McLanahan v. *United States*, 12 F. (2d) 263	32
Morehead v. *N. Y. ex rel. Tipaldo*, 298 U. S. 587	34
Osborn v. *United States Bank*, 9 Wheat. 738	13, 16
Patrick v. *United States*, 77 F. (2d) 442	32
Ray v. *United States*, 301 U. S. 158	10, 11
Romano v. *Magliulo*, 278 N. Y. S. 986	27
Smith v. *Kansas City Title Co.*, 255 U. S. 180	13, 15, 25
Steward Machine Co. v. *Davis*, 301 U. S. —, 81 Sup. Ct. Rep. 779	21
United States v. *Butler*, 297 U. S. 1	18, 21, 24
United States v. *Kreidler*, 11 Fed. Supp. 402	32
United States v. *Monoghan* (Eastern Dist. of Mo., January 9, 1935, par. 17,711, Reference Library C. C. Corp.)	27
United States v. *Ray*, 86 F. (2d) 942	10
United States v. *Schechter*, 76 F. (2d) 617	13
United States v. *Shreveport Grain & El. Co.*, 287 U. S. 77	35
United States v. *Willard*, 8 Fed. Supp. 356	27
W. B. Worthen v. *Kavanaugh*, 295 U. S. 56	33
Wright v. *Vinton Branch*, 300 U. S. 440	23

STATUTES CITED.

Constitution of the United States,	5th Amendment	25
	6th Amendment	25
	9th Amendment	8, 23
	10th Amendment	8, 23
Criminal Rules, Rule IV		1, 8, 10
	IX	1, 8, 10
Home Owners Loan Act, Sec. 1467 (a)		2, 4, 9, 28, 34, 38
	1467 (e)	2, 8, 25, 34, 36, 38
U. S. Code, Title 12, Sec. 90		17
	241	35
	264(1)	17
	332	17
	391	17
	595-6	33
	672	35

		Page
U. S. Code, Title 12, Sec.	673	35
	674	35
	701	17
	840-6	33
	840-62	17
	1020	35
	1172	17
	1434	17
	1464(k)	17
	1469	18
	1723	17
	1724	35
	1725(e)	17
	1767	17
U. S. Code, Title 15, Sec.	77q a (a)	33
	78 ff	33, 34
	331	36
	601	35
	612	
U. S. Code, Title 16, Sec.	831	36

OTHER AUTHORITIES CITED.

	Page
Farrand's "The Record of the Federal Convention", 1937 Ed., Vol. 4, pp. 85-6	20
Grant, "Commerce, Production and the Fiscal Powers of Congress", Yale Law Journal (1936), No. 5, p. 751, No. 6, p. 991	18
36 Harvard Law Review, 548, 678	
Lawson, "The General Welfare Clause"	18
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PETITIONER'S BRIEF.

Opinion Below.

The opinion of the Circuit Court of Appeals, by Manton, Circuit Judge, is reported in 89 F. (2d) 19 and appears in the record at page 595.

Jurisdiction.

The United States Supreme Court granted the petition for a writ of certiorari *Kay* v. *United States*, 300 U. S. appendix, page 38 (Part 2).

Questions Presented.

1. Whether the Circuit Court of Appeals has the power under Rules IV and IX of the Criminal Appeals Rules to

consider a bill of exceptions filed pursuant to orders of the District Court, when only the first extension order was signed by the trial judge within the 30-day period after the taking of the appeal.

2. Whether the Home Owners Loan Act of 1933, as amended in April, 1934, in so far as it creates the Home Owners Loan Corporation is constitutional.

3. Whether Section 1467 (e) of the Home Owners Loan Act, as amended in April, 1934, relating to charges, is constitutional.

4. Whether Section 1467 (a) of the Home Owners Loan Act, relating to false statements, is constitutional.

5. Whether Section 1467 (a), as to making any false statements, applies to an overstatement as to the balance due on a second mortgage or whether such overstatement is solely covered by the phrase in this section of "or whoever willfully overvalues any security."

Statement.

The indictment against this defendant, a mortgage and real estate broker, consisted of 25 counts, covering in all ten separate transactions with ten different owners.

A. *Section 1467 (e) of the Home Owners Loan Act, as Amended April, 1934.*

There were 20 counts which charged violations of Section 1467 (e) of the Home Owners Loan Act, as amended in April, 1934 (the phrase "in connection with a loan" is omitted by the amendment), relating to soliciting, contracting and receiving fees from applicants for loans contrary to its provisions. The counts do not set forth what the services were for which the defendant solicited, contracted and charged. They contain the general allegation that the

services were in connection with a loan from the Home Owners Loan Corporation and quote the words of the statute that the charge "was not for an ordinary charge or fee authorized and required by the said Home Owners Loan Corporation for services actually rendered for examination and perfection of title, appraisal and like necessary services" (R. 7).

In most instances, these contracts were in writing. They were also contingent contracts, payable only if the defendant performed her agreement to obtain the necessary reductions in certain mortgages, the waiver of interest payments, other modifications in the terms of the mortgages or the stay of threatened or pending foreclosures.

While there was some dispute as to the precise credit to be given to the defendant for her services, there was no dispute that the outside work which the defendant agreed to do was there to be done, that it required a considerable expenditure of her time and effort, and that after her intervention, reduction in the mortgage principal followed in several cases. For all her work in these ten transactions the defendant retained $140 (R. 346).

The substantial, separate and distinct character of these contracts and these services is not altered because the defendant wrote a few letters for the owners in their own names to the Home Owners Loan Corporation, nor because the Assistant District Attorney, with a barrage of leading and unfair questions, attempted to inject into the case the idea that the defendant was "to help put through the home loan" or "to get it through quickly."

The contracts made and the services rendered by the defendant were the adjustment of payments, modification of terms of mortgages, stay of foreclosures, removal of receivers, and reduction of the principal due on mortgages. The owners called in the defendant when foreclosure threats

were made or foreclosure papers actually served or a receiver appointed or a notice sent to the owners by the Home Owners Loan Corporation that their loan was approved but that the encumbrances exceeded the loan and that consequently it would be necessary for the owner to get the required reductions. In each case, some such practical difficulties confronted the owner. These obstacles were not invented by the defendant. They were real and had to be removed. This genuine need produced the contracts with the defendant.

The defendant was found "guilty" under six counts of contracting and receiving fees from applicants. She was found "not guilty" on fourteen counts of soliciting, contracting and receiving. The "guilty" transactions involving contracting and receiving cannot be distinguished from the "not guilty" transactions and in all these cases, the essential facts were admitted by the defendant.

For example, compare the summary of the undisputed facts in two transactions:

> Counts Nos. 24 & 25. The Home Owners Loan Corporation notifies the owner that the loan is granted but that the mortgages exceed the loan. Problem: how to get the 1st mortgage of $9,000. and the 2nd of $1,000. reduced? The defendant broker is engaged. She negotiates with the various mortgagees. Substantial reductions are obtained, although a dispute arises as to whether the defendant is to be credited with a reduction of $600. or $900. Defendant is paid $100. *Verdict: Guilty* (R. 87, 92, 95).
>
> Counts Nos. 21 & 22. In this case, the 1st mortgage of $7,000. and the 2nd of $1,300. exceeded the loan which was tentatively approved by the Home Owners Loan Corporation. The same problem of reduction. Contract made by the owner with the defendant to reduce these mortgages. The defendant negotiates with the mortgagees. About $500. is admittedly reduced,

although the usual dispute ensues as to just how much is to be credited to the efforts of the defendant. The defendant also wrote a two page letter for the owner in the owner's name, to the Home Owners Loan Corporation. Defendant is paid $40 (R. 192, 198). *Verdict: Not Guilty.*

B. *Two Counts under Section 1467 (a) to False Statements.*

Besides the six counts under Section 1467 (e) as to contracts and receipt of fees, the defendant was convicted on Counts Nos. 5 and 15, which charged her with knowingly making two false statements in two second mortgagee's consents as to the balance due on these two mortgages for "the purpose of influencing the action of the Home Owners Loan Corporation," contrary to Section 1467 (a) of the Home Owners Loan Act. There is no allegation in either count that any loan to the respective owner was approved or actually made or that any payment was made to the defendant or to anybody else or that the two applications ever reached the stage of being sent to a closing attorney. Only the filing is alleged (R. 13, 31).

The second mortgagee's consent to take bonds is prepared by the Home Owners Loan Corporation, is mailed to the mortgagee by the corporation and is later filed by the mortgagee with the Home Owners Loan Corporation. As the copy set out in the indictment indicates, it is in form an offer by the mortgagee which states the amount for which the mortgage is a lien, including the unpaid balance of principal and interest, and the amount in bonds, plus a nominal cash sum, which the mortgagee will accept for a satisfaction of the mortgage. The consent is temporary, for a thirty day period, and may be withdrawn on ten days notice to the State manager of the Corporation (R. 14, 32).

The mortgagee's consent to take bonds is not under oath

nor acknowledged nor verified in any form nor is there any warranty as to the accuracy of the information (R. 14, 32).

The first form of mortgagee's consent as prepared by the Home Owners Loan Corporation in Count 5, called for more detailed information as to the mortgage than the revised form in Count No. 15. The detailed information was not given (R. 15). Under Count 5, the consent ends with the statement that a certain amount was due to the mortgagee (R. 15). There is no such specific statement under Count 15 (R. 33).

C. *All Three Fraud Counts Nos. 6, 16 and 10 Dismissed on the Government's Own Motion During the Trial.*

Ordinarily, these three counts could be ignored. But in this case they are significant because they were the only three counts charging fraud—one, that of pretending to be an employee of the Home Owners Loan Corporation and two counts which charged that the two false statements in the two mortgagee's consents were made with the intent to defraud the Home Owners Loan Corporation and the two home owners. All these three counts were dismissed on the Government's own motion (R. 286).

When it is thus established that the two false statements were not made to defraud the home owners, and that they were not made to defraud the Home Owners Loan Corporation, what "crime" is there left?

D. *The Bill of Exceptions.*

Petitioner repeats what was set forth in her reply brief and not disputed before the Circuit Court of Appeals. Convicted on May 29, 1936, she moved swiftly to comply with the rules governing criminal appeals. Notice of appeal was filed promptly on June 1, 1936; during that same week written notice and request was made upon the Court

stenographers to furnish a copy of the minutes of the trial. On June 13th, the Court stenographers replied in writing demanding payment in advance of $400. On June 15th, a check for the full amount was sent by the petitioner. About the end of June the stenographers stated that because of the rush of prior official business it would be impossible for them to deliver a transcript. The District Attorney and the trial judge were informed of these facts and an order was signed on June 30th, extending the defendant's time to August 18th. Then there followed inquiries every week of the stenographers and the same answer; that prior official business would delay delivery. The last letter was written on July 28th urging that the copy be furnished at the earliest opportunity. Several days afterwards, the copy was brought to the defendant and there remained a little over two weeks in which to prepare and print and settle the bill. Every effort was made by the defendant's attorney to expedite the work, but again the appellant's efforts were unavailing. The printer was unable to furnish the work on time. When he so informed the appellant, the situation was explained to the District Attorney on or about August 17th, and he signed the stipulation extending the appellant's time and the trial judge signed the order on August 18th. The subsequent adjournments to October 19th, 1936, were all based on similar stipulations of the District Attorney and orders of the District Court.

The appellant relied on the stipulations of the District Attorney and the orders of the trial judge. If they had not signed, the bill could have been settled on the stenographer's minutes either on August 17th or the 18th.

The Circuit Court held that it lacked the power to consider the bill of exceptions, and its decision rests solely on its mistaken belief as to its authority.

Summary of Argument.

1. The Circuit Court of Appeals has the power under Rules IV and IX of the Criminal Appeals Rules to consider the Bill of Exceptions, and since its refusal was based solely on the alleged want of power, it committed reversible error.

2. The Home Owners Loan Act of 1933, in so far as it creates the Home Owners Loan Corporation, is invalid:

(a) Congress cannot incorporate a private bank. The Home Owners Loan Corporation is exclusively a Corporation with limited private banking powers.

(b) The Act does not declare the Corporation to be a fiscal agent of the United States nor a depositary of public moneys nor require it to invest any funds in U. S. Bonds.

(c) The Act cannot be sustained under the "taxing for general welfare clause" because in substance the Corporation is a corporate substitute for the taxing and appropriating power, a device to evade using this power and not an exercise of it.

(d) And if it be considered an exercise of the taxing power, it is not for the general welfare because it did not affect any vital national interest or activity, merely reducing for a limited number of owners the nominal rate of interest by 1% staying some foreclosures and shifting the right to foreclose from many mortgagees to one large corporation.

(e) And whether it be for the general welfare or not, it invades a field of local activity reserved to the people and the states under the 9th and 10th Amendments.

(f) The Act constitutes an unlawful delegation of power by Congress.

3. Section 1467 "e" of the Home Owners Loan Act, as amended in April, 1934, is invalid because it violates both the 5th and 6th Amendments:

(a) The Circuit Court of Appeals admits that "until the Corporation defined the fees which could properly be charged the crime was too vague and indefinite".

(b) Although there is not one word about the regulations in the indictment, the Circuit Court at the end of its opinion stated that the regulations had been issued and that the regulations so assumed cured the admitted vagueness of this section—apparently using the forbidden bill of exceptions to affirm the judgment, but not to reverse it.

(c) The regulations—which are found in the bill of exceptions only—do not adequately clarify the statute except as to services of appraisal, examination and closing title rendered by persons employed by the Corporation (R. 425); they leave untouched the zone covered by "and like necessary services", and the whole field of other services rendered by persons not employed by the Corporation.

(d) This section is invalid because if applied to persons not employed by the corporation, it constitutes a denial of their liberty and property without due process of law.

(e) Unlawful delegation of power. Not only is the Corporation to fix "ordinary charges" for specified services, but also for "like necessary services", and upon its definition of these indefinite clauses, the list of crimes is expanded or contracted.

4. Section 1467 "a" of the Home Owners Loan Act is invalid because it is too vague and uncertain, makes acts criminal without any intent to defraud or any improper motive, or any possible detriment to anybody and may be stretched so far as to infringe the right of free speech.

5. The appeal from the judgment and conviction is upon substantial and meritorious grounds.

Point I.

The Circuit Court of Appeals has the power under rules IV and IX of the Criminal Appeals Rules to consider a bill of exceptions although filed pursuant to the order of the trial judge signed after the expiration of the thirty-day period.

Since the petition for certiorari in this case, the opinion of the Supreme Court in *Ray* v. *U. S.*, 301 U. S. 158, p. 163 definitely establishes that however restricted the district court judge may be by Rule IX, no such fetter is imposed upon the Appellate Courts. The Circuit Court of Appeals under the Criminal Appeals Rules may correct, amplify or reduce the record on appeal. It may modify any order of the trial judge. It is given complete control of the appeal proceedings. The rules, says the Supreme Court in the *Ray* case, clearly grant this corrective power to the Appellate Courts. Regardless of the limitations on the trial Court, the Circuit Court of Appeals could have reviewed the bill of exceptions in this case, notwithstanding that it was not filed during the period of the first valid extension as granted by the trial judge.

Therefore, the Circuit Court of Appeals committed reversible error in holding that it lacked such power and that it was "foreclosed from considering the errors that are assigned respecting the bill of exceptions". *Kay* v. *U. S.*, 89 F. (2d) 19, p. 21.

Point II.

The Circuit Court of Appeals refused to review the bill of exceptions because of the alleged want of power and not in the exercise of its discretion.

In the case of *U. S.* v. *Ray* (C. C. A. 2nd Dept.), 86 F. (2d) 942, while it ruled erroneously that it had no power to review the bill of exceptions, the Circuit Court of Appeals

said plainly that even if it had the power, it would not review it because the appellant had been negligent. And because of this finding of negligence, the Supreme Court affirmed. *Ray* v. *U. S.*, 301 U. S. 158, p. 167.

There is no such issue in our case. The decision of the Circuit Court of Appeals is based exclusively on its belief that it lacked the power to review the bill of exceptions. It did not say that the appellant had offered inadequate excuses nor that her oral motion on the argument of the appeal, repeated in her reply brief, was not timely. The Circuit Court of Appeals restricted its ruling to the sole question of want of power. The trial Court had granted one valid extension during the 30 day period. No other extension, it contended, could be made by anybody, neither in the District Court nor in the Appellate Court. The appellant's doom was irrevocably sealed because the 30 day rule closed all avenue of escape. No one could come to her rescue because no one had the power. The Rules were inexorable and had to be obeyed. Briefly, the Circuit Court of Appeals, summed up its position, 89 F. (2d) 19, p. 21:

> "Respecting the bill of exceptions, although the Appellant obtained one valid extension within the permissible period, the bill of exceptions was not settled and filed in due time and we are therefore foreclosed from considering the errors that are assigned."

Since its refusal rested solely on its mistaken view of its authority its judgment should be reversed.

Point III.

The appeal from the judgment of conviction is upon meritorious grounds.

Anticipating the possible claim that it is futile to ask the Circuit Court of Appeals to consider the bill of exceptions, because the errors are trivial, it is proper at this

time to give a few samples which prove indisputably that the defendant did not have a fair trial and that the errors were so prejudicial as to compel correction:

(a) Under Counts Nos. 11 and 12 the defendant was convicted for contracting and receiving fees although the owner admitted that she was not an applicant when the contract to modify the mortgage terms was made on June 5th; nor was the owner an applicant on June 11th when the $50. payment, received by defendant, was paid over by her to the first mortgagee; the defendant withdrew from the transaction on June 11th; and *not until the end of June did the owner become an applicant for a loan at the Home Owners Loan Corporation* (R. 158).

(b) Under Counts Nos. 21, 22, 24 and 25, the contracts to reduce the mortgage principal, the services and the receipts were identical and all admitted by the defendant. The jury said "guilty" as to Counts Nos. 24 and 25 and "not guilty" as to Counts Nos. 21 and 22, revealing the confusion of the jury under the erroneous and bewildering instructions of the trial court (R. 472, 476-8).

(c) The conduct of the Assistant District Attorney in his opening, referring to other alleged offenses, in his repeated efforts to introduce matters ruled out, the constant and unfair use of leading questions, such as "Did Miss Kay ever say that she would fix things with the Home Owners Loan Corporation"? (R. 164)—plus incorrect statements and inflammatory language in the summation—calling the defendant a "vulture" (R. 438)—deprived the defendant of a fair trial (R. 86, 157, 163, 255, 393, 438, 442, 453, 454). Altogether, it constitutes the very type of misconduct condemned by the Court in *Berger* v. *United States,* 295 U. S. 78.

Point IV.

The Home Owners Loan Corporation is not authorized by the fiscal powers of Congress because the act creating it does not make it a depositary of public moneys, nor a fiscal agent of the United States nor require it to invest any funds in United States Government bonds.

In his opinion of August 22, 1933, the Attorney General cites *McCulloch* v. *Maryland,* 4 Wheat, 316; *Osborn* v. *United States Bank,* 9 Wheat. 738, and *Smith* v. *Kansas City Title Co.,* 255 U. S. 180, to prove the power of Congress to incorporate the H. O. L. C.

The appellant disagrees with this interpretation. While appreciating the warning of Judge Hand, applied to other cases, in *United States* v. *Schechter,* 76 F. (2d) 617, p. 625, that it would be "disingenuous to pretend that the *ratio decidendi* of such decisions is susceptible of statement in general principles," we believe that a more thorough analysis will disclose the major pillars upon which those corporate structures were built and that these necessary pillars are missing in the Home Owners Loan Act.

What were the legal pillars upholding the United States Bank? In *McCulloch v. Maryland,* 4 Wheat. 316, p. 426, after paying tribute to the "splendour of eloquence and strength of argument, seldom if ever, surpassed," Chief Justice Marshall held at page 422:

> "That it is a convenient, a useful and essential instrument in the prosecution of its fiscal operations. (U. S. Government) is not now a subject of controversy."

In *Osborn* v. *United States Bank,* 9 Wheat. 738, the Court reaffirmed its position in *McCulloch* v. *Maryland,* that the U. S. Bank was necessary and proper for carrying on the fiscal operations of government, and that its public function

would be crippled if its private activities were prohibited. Describing the U. S. Bank "as a machine for the fiscal operations of the government," the Court wrote, pages 865, 872:

> "The Court has already stated its conviction, that without this capacity to trade with individuals, the Bank would be a very defective instrument, when considered with a single view to its fitness for the purposes of government. On this point the whole argument rests" (p. 865).
>
> "Attempts have been made to dispense with it, and they have failed; serious and very weighty doubts have been entertained of its constitutionality, but they have been abandoned; and it is now become the functionary that collects, the depositary that holds, the vehicle that transports, the guard that protects, and the agent that distributes and pays away, the millions that pass annually through the national treasury; and all this, not only without expense to the government, but after paying a large bonus, and sustaining actual annual losses to a large amount; furnishing the only possible means of embodying the most ample security for so immense a charge" (p. 872).

A further addition of private business power was permitted in the case of *First National Bank v. Union Trust Co.*, 244 U. S. 416. The Federal Reserve Act authorized National Banks to act as trustees, executors, etc. when allowed by the Reserve Board and in conformity with state law. In upholding this extension, the Court said at page 425:

> "What those cases (McCulloch *v.* Maryland, 4 Wheat. 316 and Osborn *v.* Bank, 9 Wheat. 738) established was that although a business was of a private nature and subject to State regulation, if it was of such a character as to cause it to be incidental to the successful discharge by a bank chartered by Congress, of its public functions, it was competent for Congress to give the bank the power to exercise such private business in co-operation with or as part of its public authority."

A little later, in the case of *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, the Federal Farm Land Bank was assailed, not as a permissible mixture of public and private enterprise, but as exclusively a private enterprise—lending money on farm lands secured by first mortgages—and that this private character could not be given a public aspect by the words in the statute declaring the banks depositaries of public money and fiscal agents of the government. The words, it was argued, were just a pretext. The Court answered that if the words were written in the statute, that was sufficient:

> "We, therefore, conclude that the creation of these banks, and the grant of authority to them to act for the government as depositaries of public moneys, and purchasers of Government bonds (5% required to be so invested), brings them within the creative power of Congress although they may be intended, in connection with other privileges and duties, to facilitate the making of loans upon farm security at low rates of interest" (p. 211).

We may now attempt a summary: (A) An appropriate fiscal agent for the U. S. may be incorporated by Congress if declared to be such and actually operating and needed in that capacity; (B) Powers of private business may be granted to the public fiscal agent when necessary to strengthen or invigorate its public function; (C) The business of private banking is a private business and the loaning of money to private individuals, secured by mortgages on their own property, cannot be undertaken separately by Congress; (D) If an agency is declared by Congress to be a depositary, a fiscal agent and required to invest in U. S. bonds, then may be attached to its public power the private business power of loaning money on first mortgages.

Paragraph "D" or *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, sits on the very edge of the Constitution.

Whether legal scholars are correct in characterizing the opinion as "curiously narrow" (Prof. Corwin, 36 H. L. R. 548, 578) need not be argued. Certain it is that no court has ventured beyond its extreme limits. No court has yet said that Congress under its fiscal powers can create a corporation, without a public fiscal function, without declaring it to be a fiscal agent of the U. S. Government and equipped solely with the powers to do a private banking or mortgage business. In fact, the contrary has been held and never doubted, *Osborn* v. *U. S. Bank,* 9 Wheat. 738, page 860:

> "It was not created for its own sake or for private purposes. It has never been supposed that Congress could create such a Corporation."

And yet that is precisely the position of the H. O. L. C. It stands as a corporation with limited private banking powers to make loans to private individuals on their private homes. True, it is managed by the same board as manages the Home Owners Loan Banks, it is labelled an "instrumentality" of the United States, its stock is owned by the Government, it has the free use of the mails and its bonds were first guaranteed as to interest and then as to principal by the United States. But these facts do not add to its public powers and functions. It is not declared by Congress to be a depositary of public moneys; it is not declared to be a fiscal agent of the United States; and it is not required to invest in United States bonds. It lacks the public foundation upon which the private powers may be attached. It remains a corporation equipped to do solely a private banking or mortgage business.

Subsequent amendments in 1935 authorizing the H. O. L. C. to purchase bonds of the Federal Home Loan Banks, shares of the Federal Savings and Loan Associations and of the Federal Savings and Loan Corporation, even if they could change the character of the H. O. L. C.,

cannot be considered, as the indictment deals solely with the Act of 1933, as amended in April, 1934.

Whenever Congress intended to make a corporation a fiscal agent of the United States, it has always stated that fact clearly. A formidable list of banking and similar agencies have been so endowed by express provision in their respective statutes. In Title 12, U. S. C. Sec. 90, National Banks are declared to be depositaries of public moneys and financial agents of government. Likewise: Federal Deposit Insurance Corp., Sec. 264 (1); all State banks or trust companies if members of the Federal Reserve system, Sec. 332; Federal Reserve Banks, Sec. 391; all Federal land banks and joint stock land banks, Sec. 701; the Central Bank for Co-operatives, the Production Credit Corp., Production Credit Associations, the Federal Farm Mortgage Corp. and Banks for Co-operatives, Sec. 840-62; Federal Intermediate Credit Banks, Sec. 1024; Nat'l Agricultural Credit Corps., Sec. 1172; Federal Home Loan Banks, Sec. 1434; Federal Savings & Loan Associations, Sec. 1464 (k) (in *Hopkins Savings Association* v. *Cleary*, 296 U. S. 315, the section of the H. O. L. Act regulating the conversion of State associations into Federal S. & L. Ass'ns was invalidated, but power of Congress to create them not decided; "as to that we do not indicate an opinion either one way or the other") (p. 336); Housing Mortgage Association, Sec. 1723; Federal Savings & Loan Insurance Corp., Sec. 1725 (d); each Federal Credit Union, Section 1767; and R. F. C., Title 15, U. S. C. Sec. 612. (In *Langer* v. *U. S.*, 76 F. (2d) 817, the Court upheld the R. F. C. because Congress expressly authorized it to act as financial agent and depositary of the Government.)

Not only did Congress fail to confer such powers on the Home Owners Loan Corporation, but it actually authorized the Federal Reserve Banks to act as fiscal agents for

the H. O. L. C. Title 12, U. S. C. Section 1469-1 reads: "The Federal Reserve Banks are authorized, with the approval of the Secretary of the Treasury to act as depositaries, custodians and fiscal agents for the H. O. L. C." In short, the H. O. L. C. was never created as an agent for the fiscal operations of the U. S., and it was not able nor equipped to act as such for itself.

Point V.

Congress may tax and appropriate for the general welfare but it cannot create a corporate device which in effect dispenses with the taxing power and is a substitute for it.

Admittedly, as the Circuit Court of Appeals states in its opinion, Congress is granted the power to tax to promote the general welfare of the United States. It may appropriate and spend for a variety of public purposes, beyond the precise ambit of the delegated powers, *U. S.* v. *Butler*, 297 U. S. 1. This decision ended a long continued debate among legal scholars which threatened to engulf our lawyers with an increasing flood of articles and books, although many were excellent and thorough, and settled the debate wisely by adopting the broad and liberal interpretation of Hamilton, the lawyer, rather than the narrow and strict interpretation of Madison, the layman. (See Lawson, "The General Welfare Clause"; Grant, "Commerce, Production and the Fiscal Powers of Congress," Yale L. J. (1936) No. 5, p. 751, No. 6, p. 991; Post, "The Constitutionality of Government Spending for the General Welfare"; McGuire, "The New Deal and the Public Money," Georgetown L. J. (1935), Vol. 23, No. 1, p. 1.)

But while not disputing the existence of the power, we do ask: is the Home Owners Loan Corporation an exercise of that power? Or is it a corporate device to avoid using that power? No tax supports it and no appropriation of

funds from the treasury of the United States. To purchase the capital stock of not over $200,000,000, to which the Secretary of the Treasury is authorized to subscribe, the Home Owners Loan Act provides that: "the Reconstruction Finance Corporation is authorized and directed to allocate and make available to the Secretary of the Treasury the sum of $200,000,000 or so much thereof as may be necessary." Aside from that, the Home Owners Loan Corporation is completely the creature of the power to incorporate. As such, it is authorized to issue its own bonds, at first not exceeding two billions and later almost five billions, or to be exact not over $4,750,000,000. In essence, there was created a corporation, which spread and grew far beyond the possible allocation by the R. F. C. of not over a couple hundred millions, into a corporate giant with billions of bonds. This whale of a corporation was not produced by the taxing and appropriating power of the United States. It grew into a corporate leviathan without taxes, without appropriation and without the spending power of the government, and solely on its own corporate fiat it expanded from a two billion into an almost five billion dollar institution.

It may be said correctly that the Home Owners Loan Corporation is a corporate entity which dispenses with the exercise of the taxing and appropriating power of the government. Instead of taxing and appropriating out of the general funds of the United States, there was invented a substitute. In effect, Congress says: "We shall not tax nor appropriate government funds; we shall create a corporate being capable of standing on its own feet and which can issue its own bonds."

Obviously, the legal father of such a corporate child is the power to incorporate. Such power is not expressly granted to Congress, although it may be implied when the

corporation is a convenient, useful and essential instrument to execute a power delegated to Congress. *But the incorporating power may not be implied to avoid using the delegated power.* If that were permitted, small appropriations would be sufficient to spawn an unlimited corporate progeny, not through the exercise of the taxing and spending power, which Congress has, but by dispensing with the taxing power and substituting corporate creatures for every purpose which might conceivably be labelled general welfare. Practically speaking, Congress could then transform an implied power of limited scope into an express power of general incorporation.

POINT VI.

If the Home Owners Loan Corporation be considered an exercise of the taxing power, it is not for the general welfare because it changes slightly certain creditor-debtor relations by reducing by 1% the interest rate of some home owners, and shifting the right to collect and to foreclose from many mortgagees to one large corporation without affecting any vital national interest or relationship.

The 1937 revised edition of Farrand's "The Records of the Federal Convention" does not furnish any additional information as to the general welfare clause except to add a letter of Madison to Cabell containing a brief summary, confirming the outline in the first Edition, that the clause at first "simply expressed 'a power to lay laws, duties, imposts and excises' without pointing out the objects". Then the solicitude about the public debts led to the addition "to pay the debts" and there was substituted the phrase "for the expenses of the government", and finally the terms of the old Articles of Confederation were used: provide for the common defense and general welfare (Vol. 4 p. 85-6).

What is the general welfare? The concept is not static (*Helvering* v. *Davis,* 81 Sup. Ct. (L. Ed.) 804, p. 808, 301

U. S. —). It is broad enough to cover old age benefits under the Federal Social Security Act (*Helvering* v. *Davis, supra*) and unemployment insurance to relieve the unemployed and their dependents (*Charles C. Steward Mach. Co.* v. *Davis,* 81 Sup. Ct. (L. Ed.) 779, 301 U. S. —).

In its opinion, the Circuit Court of Appeals gives a list of other appropriations made by Congress to prove "what has been accepted to be the expenditure of public funds for a public purpose". As to these, the first answer was made by this Court in *United States* v. *Butler,* 297 U. S. 1, p. 73:

> "Such expenditures have not been challenged because no remedy was open for testing their constitutionality in the courts."

However, even if such appropriations were tested and upheld, they reveal, as does the Social Security Law, certain characteristics which place them apart from our case. When you deal with the conservation of natural resources, the health, the livelihood or education of the people, you have something "truly national" (*U. S.* v. *Butler,* 297 U. S. 1, p. 87). Whether millions of people throughout the country shall eat or starve, work or be idle, educated or ignorant, is a matter of national concern. On such things depends the very existence and future of the nation, the quality of its manhood and womanhood. They impinge on life itself and affect people in their most general and vital relations as citizens, as producers and as consumers. In such instances, the rescuing arm of the Government should be free to protect its people from serious national ills.

Another distinguishing feature of these appropriations to promote the people's health and education, meet the needs of the aged and unemployed or preserve natural resources, is that they do not involve ordinary private transactions. They deal with the domain of public or general relations, a

field hardly touched by private contract or private enterprise.

How different is the H. O. L. C.: an agency to reduce interest rates from 6% to 5%, a slight shuffling of the debtor-creditor relationship. The debtor now substitutes for his existing contract to pay 6% a new contract with a large corporation to which he agrees to pay 5% over a longer period of time, with certain installments of principal. The right to foreclose is not stayed nor abolished; it is shifted from many mortgagees to one large corporate mortgagee. The right to take deficiency judgments is not stayed nor abolished; it is centered in the Home Owners Loan Corporation.

Appellant realizes that whether an expenditure is for the general welfare "is a practical question addressed to the law making department" (*Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, 515) and that "it will require a very plain case to warrant the courts in setting aside the conclusion of Congress in that regard" (*Cincinnati Soap Co.* v. *United States*, 301 U. S. 308).

We submit that the H. O. L. C. is such "a very plain case". A minor change of private debtor-creditor relationships cannot constitute "the general welfare". If it does, then the sky is the limit as to what may be done under this clause.

Point VII.

And whether or not the Home Owners Loan Corporation be an exercise of the taxing power for the general welfare, it is invalid because it invades the rights and powers reserved to the States and the people.

While the taxing power is "the least limitable" of powers, whose boundaries will ever elude precise description, there is no dispute that every delegated power, however general, is hedged in by the very Constitution in which it is found. For example, all of the delegated powers are

subject to the Fifth Amendment. (*Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555, p. 589; *Wright* v. *Vinton Branch,* 300 U. S. 440, p. 457). And with the exception of powers over money matters—where there is coupled with the grant to Congress a definite prohibition against their exercise by the states—and possibly that over foreign commerce (*Board of Trustees* v. *United States,* 289 U. S. 48, p. 57), all of the delegated powers are subject to the restraints of the 9th and 10th Amendments.

Legal scholars have not adequately considered these two amendments. The very phrase of Prof. Corwin "dual federalism" tends to obscure the real situation, which might be more accurately described as one of "triple federalism". It is not merely a case of the nation and the states. The 9th Amendment refers to rights *"retained by the people"*. The Tenth Amendment mentions powers reserved, not only to the states, but *"to the people"*. We have established a triple federalism: the National Government, the states and the people. There are some powers which have been granted to Congress, some to the states and some powers and rights have been reserved to or retained by the people.

Unless the taxing-for-the-general-welfare is subject to these restrictions, it may be stretched to cover every substantial activity in the country, and with such indefinite expansion Congress becomes omnipotent, and, not only the local powers of the States, but the local rights and powers of the people may be obliterated. Such a concentration of power destroys the balance and separation of powers and rights between the Nation, the States, and the people which our system of "triple federalism" ordained, and it tends to produce the very apoplexy at the center and paralysis at the extremities which federalism prevents.

The Circuit Court of Appeals in its opinion says that there is no attempt to employ the taxing and spending

power to accomplish prohibited ends as there was found to be in *United States* v. *Butler*, 297 U. S. 1. But is the difference visible? The lending of money to private individuals on their private houses, the rates of interest to be paid by them, the terms of their mortgages, fees of mortgage brokers, appraisals of private homes, examination of titles to such homes, the closing of loans to the same homes and the foreclosure of mortgages are indubitably private and local activities. They are just as private and local an activity as the planting of wheat or potatoes. If Congress, through the taxing power, cannot invade the local field of making contracts with farmers to reduce their acreage of wheat, it cannot enter the local field of making contracts to reduce the rate of interest payable by a homeowner, to substitute a new form of mortgage, with a long term investment instead of a short term investment, with amortization of principal, and with the customary power to foreclose in the event of default.

So with the Guffey Coal Act. It might have stabilized conditions in some 20 states, beneficially affected hundreds of thousands coal miners, not on a minor point like a one (1%) per cent interest reduction, but as to whether they could work and live, and possibly produced good repurcussions throughout the other states. Yet the government in its brief, *Carter* v. *Carter Coal Co.*, 298 U. S. 238, p. 289, conceded that the tax stood or fell, not with the general welfare clause, but with the power to regulate interstate commerce.

And by analogy, if Congress, according to *Ashton* v. *Cameron County Dist.*, 298 U. S. 513, cannot extend the bankruptcy power to provide for voluntary petitions by embarrassed districts to readjust their debts because the reserved powers of the States block the way, with equal certainty the same powers and rights reserved to the

people or the States block voluntary applications by embarrassed debtors for the readjustment of the encumbrances on their homes.

Nor is the contrary held by the case of *Smith v. Kansas City Title Co.*, 255 U. S. 180, also cited in the opinion of the Circuit Court of Appeals. While the argument that the Farm Land Bank could be sustained under the taxing for general welfare clause was pressed vigorously, the Court merely continued the line of reasoning of Chief Justice Marshall as to the incorporation of a National Bank. If a National Bank or a Farm Land Bank were authorized to act as fiscal agent of the United States, it could also be empowered to trade with individuals. But trading or loaning money to individuals remained a private enterprise, a local activity, which Congress could not undertake by a Corporation devoted exclusively to that local and private field.

POINT VIII.

Sections 1467 "A" and "E" violate both the 5th and 6th Amendments, deprive people of their liberties and contract rights without due process of law, punish them for not knowing a new law, vague and uncertain, about which lawyers are in doubt and the lower courts in conflict.

Even if the main trunk should stand, these two branches of the Act should be lopped off unhesitatingly. (In *Hopkins Savings Association* v. *Cleary*, 296 U. S. 315, another section of the Home Owners Loan Act regulating the conversion of State associations into Federal Savings and Loan Associations was invalidated.)

A. *First, let us examine Section 1467 "e":* The Circuit Court of Appeals expressly admits in its opinion that the statute by itself is too vague and indefinite: "It is undoubtedly right to say that until the Corporation defined

the fees which could properly be charged the crime was too vague and indefinite." (*Kay* v. *U. S.*, 89 F. (2d) 19, p. 22.)

What has cured this obvious defect? The regulations of the Corporation? "At the time that the appellant committed the acts charged," so continued the opinion of the Circuit Court of Appeals, "the Corporation had already issued its regulations and defined the fees and charges which could validly be solicited and received". (*Kay* v. *U. S.*, 89 F. (2d) 19, p. 23.)

But where is the proof that any such validating regulations had been issued? The indictment does not contain a word about any regulations; it repeats the exact words of the statute (R. 7). *The only proof of any regulations appears in the bill of exceptions, which the Circuit Court claims it is forbidden to consider.* Well, if it cannot look at it to reverse the judgment, it cannot peek at it to affirm the judgment.

However, the regulations, as set forth only in the bill of exceptions (R. 422-6), do not remove the essential vagueness and indefiniteness of the statute. They fix the fees for a few specified services such as appraisal, examination of title and the closing of loans. But these remove only the lighter fog surrounding the statute. What are "like necessary services," probably the broadest expression in this section? To whom does the section apply? Is it limited to appraisers, examiners and attorneys employed by the Home Owners Loan Corporation? Does it include the services of mortgage brokers engaged by the owners to modify or adjust or obtain reductions of mortgages? What about services rendered to an applicant which have only an indirect bearing on the loan? The regulations will be searched in vain for any answer (R. 422-6).

The vagueness in the statute begets the conflict in the decisions. In *Handler* v. *Hill* (C. C. A. 3rd C), 90 F. (2d)

573, this section was sustained as unambiguous, but the court, it is submitted, was influenced by the erroneous assumption that the penal clause in the case of *Margolin* v. *U. S.*, 269 U. S. 93, was similar to the clause in the Home Owners Loan Act. While part of the phraseology is alike, there are essential differences which must not be overlooked. In *Romano* v. *Magliulo*, 278 N. Y. S. 986, this section was restricted to the employees of the Home Owners Loan Corporation, namely, the appraisers, the title examiners and the closers who were employed by the Corporation itself. (Admittedly, the defendant in our case was not employed by the Home Owners Loan Corporation.) In *United States* v. *Willard*, 8 Fed. Supp. 356, p. 357, nothing is said as to any such restriction, but the court held that until "ordinary charges" are regulated and defined by the Corporation "the statute is lacking in that certainty which is required to uphold criminal statute and indictments thereunder against attack for vagueness and indefiniteness". As to the construction of the statute after the regulations were promulgated, the Court did not decide.

Another variation is found in *United States* v. *Monoghan*, Eastern District of Mo., Jan. 9, 1935, par. 17,711, Reference Library C. C. Corp. Before the amendment of April 1934, the statute was certain enough, so the Court ruled. As to the amended statute, upon which our indictment is founded, the Court said:

> "The statute as above set out was effective from June 13, 1933 until April 27th, 1934, when it was amended. The amendment omitted the words 'in connection with a loan by the Corporation, or an exchange of bonds or cash advanced under this Act'. This apparent oversight has rendered the present statute entirely too vague to constitute the basis of a criminal charge."

And in the unreported case of *United States* v. *Damon* and *Layton*, District of Minnesota, Judge Molyneaux, after trial, dismissed the indictment, holding that *both before and after the amendment*, the statute was too vague, Official memorandum, page 5, 6, January 9, 1935:

> "Even if these words ('in connection with a loan by the corporation') were in there, they have left it hazy and vague as to what would be improper charges condemned by the law * * *. I am sure that I cannot leave it to the jury; I would have to say whether it was condemned by the statute. But the statute is so vague that I cannot decide the question as to whether it was in connection with a loan or was not in connection with a loan, or whether it was anything that was condemned by the statute."

In the Eastern District of New York this section is upheld but with the devastating results which Judge Molyneaux feared in the *Minnesota* case and which compelled him to take the case from the jury. In our case, the jury, to take only one example of similar contradictions, convicts the defendant under Counts Nos. 24, 25, for receiving $100 and acquits under Counts Nos. 21, 22, for receiving $40.00, *although in both instances, the services, the contracts and the receipt were without question identical and all admitted by the defendant.* The jury was left in a haze, smothered by instructions which could not make clear and definite what was blurred and indefinite in the statute (R. 92, 196, 472, 476-8).

B. *Section 1467 "a", as to false statements:*

(1) What is covered by such a statute? "Any statement knowing it to be false" for the purpose "of influencing in any way" the action of the Home Owners Loan Corporation. Who can tell what trivial slip of tongue or pen is prohibited by such a statute? It need not be in writing.

It need not be under oath. It need not be material. It need not be with the intent to defraud nor to influence in any improper way nor to jeopardize the loan in the slightest degree. In short, it lacks all the essential elements of an understandable crime. It violates that wise Roman rule: *de minimis non curat lex.*

The Circuit Court in its opinion says that Congress has the power "to safeguard the lending system which it had established." (*Kay* v. *United States,* 89 F. (2d) 19, page 22. To safeguard against what? Material and relevant perils; substantial dangers or defects, which might impair the security behind the loan; safety against whatever situations directly affected the repayment of the loan—against all such, Congress should erect protective barriers.

But any statement in the 2nd mortgagee's consent as to the balance due cannot endanger nor directly influence any loan made by the Home Owners Loan Corporation. The second mortgagee is not an applicant for a loan. The corporation sends him a mortgagee's consent in which it asks him to put down the amount for which the mortgage is a lien, including unpaid principal and interest, and to state what sum in bonds, plus nominal cash, he will take to satisfy it. The very practice of the H. O. L. C. negatives reliance on the 2nd mortgagee's consent. What were the central and operative facts which produced the loan to the homeowner? The value of the land, the building and the earning capacity of the owner. None of these essentials were fixed nor influenced by such remote and minor things as careless guesswork in a 2nd mortgagee's consent. The Home Owners Loan Corporation made three independent appraisals; it hired a title company to search the records; it hired the closing attorney; it drew all the papers; it might or might not make the loan, depending on the type of house, legal defects or encumbrances, lack of value or

doubtful income of the owner; and very often the loan was for less than the amounts which the mortgagees had consented to take, in which event, the owner was notified that he would be obliged to get the necessary reductions and later report back to the Home Owners Loan Corporation, which, in turn, would arrange for the closing, and at this closing the final and correct adjustments would be made.

There is another fact which belies any reliance on or purpose to influence by the so-called false statements as to the balance due on second mortgages. As a matter of common knowledge second mortgages were so deflated that they had only a nuisance value. It was no longer a question of precise figures as to the exact sums due, but what nominal sum, if any, would be paid to the second mortgagee for the delivery of the satisfaction piece. What was the effect of this well known practice? It destroyed the need for accuracy. Why spend time over old receipts to figure out if the correct balance due on a second mortgage was exactly $874.50 when $100 or so at the most would be available? And this practice did more. It destroyed every possibility that any influence would be exercised on the corporation by any figures as to amount due in the 2nd mortgagee's consents. Whatever these figures, whether correct or incorrect, they were irrelevant and ignored. The only issue was: not what was due or not due, but how little would the corporation pay and how little would the 2nd mortgagee take?

That the figures as to the amount due to a second mortgagee could not be the basis or the source of any "influence" is further established by the final paragraph of the 2nd mortgagee's consent. In this final paragraph, the 2nd mortgagee states what in substance is his agreement, namely, what sum in bonds he will accept for his satisfaction piece (R. 15, 33). *What he will take in bonds is not limited. He is not legally restricted to the exact cash balance due on*

his second mortgage. He might ask for more in bonds because he disliked the low bond interest, or because he feared that the market value of the bonds might drop. Whatever the motivating cause, what sum the 2nd mortgagee would consent to take in bonds was flexible, wholly within his discretion, and, for the practical purpose of influencing action, *this binding contract figure would completely supersede and in effect wipe out any prior guess, correct or incorrect, as to the alleged balance due.*

Besides, the temporary character of the consent limits any purpose to influence to the vanishing point. The consent is a temporary agreement for 30 days, which may be withdrawn after that period on a 10 day notice. As the time required to pass upon the applications invariably exceeded the 30 day period, the 2nd mortgagee's consent was obviously an offer subject to cancellation at any time before closing, and consequently, this, in effect, told the corporation that all figures in the consent in January, for example, would be subject to recall or revision at a closing in June or later, and such notice made such preliminary figures of no earthly consequence or influence. Only at the closing would the corporation actually settle down to consider and pass upon the consents. Before that, everything being subject to recall, everything was tentative and up in the air. (Parenthetically, in neither Count No. 5, nor Count No. 15 was there any allegation that the loan reached the point of closing, was ever considered or was ever made—merely that the consent was filed, R. 13, 31.).

To summarize: no loan was applied for by a second mortgagee and no loan was made on the security of a second mortgagee; a satisfaction piece of the second mortgage was purchased for whatever in bonds the second mortgagee could be persuaded to take; and the loan to the owner was made solely on the security of the property and earning

capacity of the owner, with no practical attention being paid to any second mortgagee's consent.

(2) Even freedom of speech and criticism might be checked and the critic rendered subject to indictment under this section. For example, suppose a critic sharply disagreed with the foreclosure policy of the Home Owners Loan Corporation and its former practice of entering large deficiency judgments; and in making his criticism, suppose he incorrectly stated the number of deficiency judgments which had been entered—the critic could be indicted for knowingly making a false statement for the purpose of influencing in any way the action of the Home Owners Loan Corporation.

(3) It is no answer that indictments would ordinarily not follow such incorrect statements and would only be found when fraud was practiced on the Home Owners Loan Corporation and the security for the loan was materially impaired. Such was the case of *Patrick* v. *United States*, 77 F. (2d) 442, where Patrick obtained a loan from the R. F. C. on fake warehouse receipts by falsely representing that there was wheat in the warehouse when in fact there was none. So in *McLanahan* v. *United States*, 12 F. (2d) 263, under the Federal Farm Land Bank Act, sustaining a somewhat similar section, the particular statement was held relevant and material. Besides, the statement under the Farm Land Bank Act must be made under oath, it must be in writing and it is made by the applicant owner who expects to make an important contract with the lending agency on the basis of the statement. Likewise, in *United States* v. *Kreidler*, 11 Fed. Supp. 402, this section was sustained on the ground that the secret agreement by the first mortgagee to take back a second mortgage was material, violated an important rule of the Corporation and might diminish the owner's ability to pay the Home Owners Loan

Corporation. But these decisions in effect amend this section, and other somewhat similar statutes, by adding the words "material" and "relevant" which were deliberately omitted by Congress. Instead of practically rewriting it, the Court should strike it out and curb the too easy creation of statutory criminals except where there is fraud or material misrepresentation or substantial impairment of the security back of the loan.

(4) The bounds of moderation or reason should not be broken unless urgently required to safeguard the agency or function in question. Of an entirely different act, in *W. B. Worthen* v. *Kavanaugh*, 295 U. S. 56, p. 60, the Court said:

> "Even when the public welfare is invoked as an excuse, these bounds (of moderation or reason) must be respected."

In other statutes, Congress has kept within more reasonable bounds. In the case of Federal Reserve Banks, the false statement must be *material* (Title 12, U. S. C., Secs. 595-6); the Federal Credit Association (Title 12, U. S. C., Sec. 840-6) punishes "any *material* false representation for the purpose of obtaining any loan"; and in the Federal Securities Act, Title 15, U. S. C., Sec. 77q a(2), 78ff, the statement must be "false or misleading with respect to any *material* fact." (*Coplin* v. *United States* (C. C. A. 9th), 88 F. (2d) 652).

(5) The same objections apply to the clause: "Whoever willfully overvalues any security." Besides, if to overstate the amount due on a second mortgage is to "overvalue a security," then the section by making overvaluation a distinct offense has taken it out of the class of false statements and put it in its own separate category. Therefore, if a defendant states a greater amount than is correctly due that would constitute the offense of overvaluation,

and the defendant could be indicted only for that particular crime. Not having been so charged, Counts Nos. 5 and 15 of this indictment, which set out only an overstatement of the balance due or overvaluation, should be dismissed.

C. As to both Section 1467 "a" and "e", not only are they too broad and indefinite, forming dragnets capable of catching whales and minnows, but even if they were clear and limited, they are new regulations, administrative rules, the existence and extent of which nobody knows in advance. For a considerable preliminary period, even lawyers are in a fog, courts in conflict, and the laymen completely bewildered. The rule that ignorance is no defense is surely inapplicable to such a situation. That rule was based on criminal laws which were criminal by common consent and common knowledge. This general certainty and knowledge justified the presumption and the rule. Likewise, the admitted confusion and lack of knowledge on everybody's part today should be the foundation for a fairer and more sensible rule. Already, such a rule is in the making. In the Federal Securities Act, Title 15, U. S. C., Section 78ff, there is this provision:

> "but no person shall be subject to imprisonment within this section for the violation of any rule or regulation *if he proves that he had no knowledge of such rule or regulation.*"

A further advance toward a genuine due process of law is outlined, although not commented upon in *Morehead* v. *N. Y. ex rel. Tipaldo*, 298 U. S. 587, 606:

> "If after the hearing he approves the report, he 'shall make a directory order which shall define minimum fair wage rates,' Section 557. Upon hearing and finding of disobedience the Commissioner may publish the name of an employer as having failed to observe the directory order Section 559. If, after a directory order has been

in effect nine months, the commissioner is of opinion that persistent non-observance is a threat to the maintenance of the prescribed standards, he may after hearing make the order mandatory. Section 560. Violation of a mandatory order is a misdemeanor punishable by fine, imprisonment or both. Sec. 565."

Such a procedure corresponds to the actual facts of today. Any other makes a defendant the sport or victim of chance, and responsible for what it is impossible to know.

POINT IX.

The Home Owners Loan Act in so far as it relates to the Home Owners Loan Corporation and Section 1467 "e" in particular, are invalid as an unlawful delegation of power.

It is hardly necessary to cite authority that the legislative power of Congress cannot be delegated (*U. S.* v. *Shreveport Grain & El. Co.*, 287 U. S. 77, p. 85).

The Home Owners Loan Act delegates to the Federal Home Loan Bank Board the power to create a corporation to be known as the Home Owners Loan Corporation. In this regard it differs from the language of numerous other acts of Congress. In these others Congress creates, it does not delegate. In 12 U. S. C. Sec. 241, "A Federal Reserve Board is hereby created"; 12 U. S. C. Section 1020 "there hereby is established a corporation to be known as the Federal Farm Mortgage Corporation"; in the Federal Farm Loan Board, details as to establishment are set out in 12 U. S. C. Sec. 672, the temporary directors, bonds, officers in Section 673, and organization certificates, Section 674; under Federal Home Loan Bank Act of July 22, 1932, each Bank files original certificate with the Board, which is created by the Act; in 12 U. S. C. Sec. 1724, the Federal Savings and Loan Insurance Corporation "is hereby created", and similar expressions are used in 15 U. S. C. Sec. 601, with reference to the R. F. C., 15 U. S. C. Sec.

331, the War Finance Corporation, and 16 U. S. C. Section 831, the T. V. A.

Nor is that all. When home owners were to be considered in distress was not defined until April, 1934. There is no limitation upon the Board as to method or place of organization of the corporation. The Board is also authorized to regulate the retirement, cancellation of bonds and stock of corporation and reasonable value for purpose of liquidation; likewise, the declaration of dividends as may be earned and proper for the corporation to pay to the United States.

No standard is set for fixing the rate of interest except that it shall not exceed 5% where bonds are used and not over 6% in certain other cases where cash is advanced. There is no minimum.

Now as to Section 1467 "e". Under this section, the corporation is authorized to decide "ordinary charges" not only for examination and perfecting of title and appraisal, but also for "like necessary services". And according as the corporation interprets that phrase strictly or broadly, the field of criminal acts is contracted or broadened. If it decides that Act A is a "like necessary service," the charge is prohibited and the citizen who performs it may land in jail. If on the other hand, it should conclude that Act B is not a "like necessary service", then the citizen who performs it is not a criminal.

Who can predict with any reasonable certainty what acts will be legal and what acts will be illegal under such an elastic standard? Has Congress the right to substitute such guesswork for the definite provisions of a penal statute? We think not. When it authorizes another body to increase or decrease its range of application, pursuant to an extremely general phrase, you have "delegation running riot". And what are "ordinary charges"? By what place,

time or period or average are they to be decided? The usual answer is that such things do not admit of precise measure. And the answer proves that they should not form part of a criminal statute.

Respectfully submitted,

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APPENDIX A.

Statutes.

The provisions of the Home Owners Loan Act, as amended April 1934, which the defendant is charged with having violated are found in Title 12 U. S. C. Section 1467(a) and (e):

(a) Whoever makes any statement, knowing it to be false, or whoever willfully overvalues any security, for the purpose of influencing in any way the action of the Home Owners Loan Corporation or the Board or an association upon any application, advance, discount, purchase, or repurchase agreement, or loan, under this chapter, or any extension thereof by renewal deferment, or action or otherwise, or the acceptance, release, or substitution of security therefor, shall be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both.

(e) No person, partnership, association or corporation, shall, directly or indirectly, solicit, contract for, charge, or receive, or attempt to solicit, contract for, charge, or receive, from any person applying to the Corporation for a loan, (1) any fee, charge, or other consideration, whether bond or cash, except ordinary fees authorized and required by the Corporation for services actually rendered for examination and perfection of title, appraisal, and like necessary services, or (2) any moneys, check, note, or other form of obligation, representing payment of any difference which may exist between the market value and the par value of the bonds of the Home Owners Loan corporation. Any person, partnership, association, or corporation violating the provisions of this subsection shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than two years, or both.